

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

DOCKET NO. PEN-15-562

STATE OF MAINE,
APPELLEE

v.

RUSSELL CARTER,
APPELLANT

RECEIVED
MAY 09 2016
Clerk's Office
Maine Supreme Judicial Court

ON APPEAL
FROM THE PENOBSCOT COUNTY UNIFIED CRIMINAL COURT

APPELLEE'S BRIEF

R. Christopher Almy
District Attorney

Tracy Collins
Assistant District Attorney
Bar No. 4835

Prosecutorial District V
97 Hammond St.
Bangor, ME 04401

(207) 942-8552

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

DOCKET NO. PEN-15-562

STATE OF MAINE,
APPELLEE

v.

RUSSELL CARTER,
APPELLANT

ON APPEAL
FROM THE PENOBSCOT COUNTY UNIFIED CRIMINAL COURT

APPELLEE'S BRIEF

R. Christopher Almy
District Attorney

Tracy Collins
Assistant District Attorney
Bar No. 4835

Prosecutorial District V
97 Hammond St.
Bangor, ME 04401

(207) 942-8552

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES	1
SUMMARY OF ARGUMENT	1
PROCEDURAL HISTORY	2
STATEMENT OF FACTS	3
LAW AND ARGUMENT	6
I. <u>The affirmative defense of renunciation does not apply to the crime of solicitation of a minor to commit a prohibited act.</u>	
.....	6
II. <u>Viewed in the light most favorable to the State, the evidence was sufficient to prove beyond a reasonable doubt that, at the time of the solicitation, the Defendant intended to engage in a prohibited act with "Samantha."</u>	
.....	7
III. <u>The trial court did not err in denying the Defendant's motion to dismiss based on improper venue after the close of the State's case when the illegal communications were sent from Sagadahoc County, Maine, and received in Penobscot County, Maine.</u>	
.....	8
CONCLUSION	10
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

CASES

<i>State v. Baldwin</i> , 305 A.2d 555 (Me. 1973)	.....	9-10
<i>State v. Collin</i> , 1997 ME 6, 687 A.2d 962	.....	9
<i>State v. Hayden</i> , 2014 ME 31, 86 A.3d 1221	.....	7-8
<i>State v. Newell</i> , 638 A.2d 1159 (Me. 1994)	.....	9

STATUTES

17-A M.R.S.A. § 7	.....	9
17-A M.R.S.A. § 153	.....	6
17-A M.R.S.A. § 154	.....	6
17-A M.R.S.A. § 259-A	.....	2, 6

LEGISLATIVE HISTORY

L.D. 1673 (125th Legis. 2011)	7
-------------------------------	-------	---

RULES OF COURT

M.R.U. Crim. P. 21	8-9
--------------------	-------	-----

STATEMENT OF ISSUES

- I. **Whether the affirmative defense of renunciation applies to the crime of solicitation of a minor to commit a prohibited act.**
- II. **Whether, viewed in the light most favorable to the State, the evidence was sufficient to prove beyond a reasonable doubt that, at the time of the solicitation, the Defendant intended to engage in a prohibited act with "Samantha."**
- III. **Whether the trial court erred in denying the Defendant's motion to dismiss based on improper venue after the close of the State's case when the illegal communications were sent from Sagadahoc County, Maine, and received in Penobscot County, Maine.**

SUMMARY OF ARGUMENT

First, the affirmative defense of renunciation, which applies to solicitation under Section 153, does not apply to solicitation of a minor to commit a prohibited act under Section 259-A. The crime of solicitation of a minor to commit a prohibited act is complete at the moment a defendant solicits a minor to commit a prohibited act if, at that time, the defendant has the intent to engage in that prohibited act. As such, the Defendant cannot avail himself of this defense with this charge.

Second, viewing the evidence in the light most favorable to the State, the evidence -- which included repeated and aggressive solicitations for a variety of sex acts, an insistence to meet in person as opposed to continuing a talking relationship, and discussion of mundane logistical details about meeting up, such as locations, times, and vehicles -- was sufficient to prove beyond a reasonable doubt that, at the time of

the solicitation, the Defendant had the intent to engage in prohibited acts with a 13-year-old girl.

Third, the trial court did not err in denying the Defendant's motion to dismiss based on improper venue. The Defendant waived a challenge to venue when he failed to make a motion before the close of the State's case. Regardless, venue was proper in Penobscot County where the communications here were received in Penobscot County. Even if the Court were to determine Sagadahoc County, the location from which the communications were sent, was the proper venue, the Superior Court retained jurisdiction, and the Defendant can identify no prejudice as a result of venue in Penobscot County.

PROCEDURAL HISTORY

On June 19, 2014, the Defendant pleaded not guilty to one count of solicitation of a minor to commit a prohibited act under Title 17-A, Section 259-A(1)(A). (A. 1, 20.) On January 8, 2015, the Defendant waived his right to a jury trial, and on September 21, 2015, a bench trial was held. (A. 4.) After the close of the State's case-in-chief, the Defendant moved to dismiss the case based on improper venue; the trial court denied the motion. (T. Tr. 108, 116-17.) After the one-day trial, the trial court (*Murray, J.*) took the case under advisement. (A. 4.) On October 16, 2015, the trial court found the Defendant guilty, and on October 30, 2015, it sentenced the Defendant to six months

incarceration, all suspended, with one year of probation. (V. Tr. 4-5; A. 5.) The Defendant timely filed this appeal.

STATEMENT OF FACTS

In 2014, officials at the Carmel Elementary School discovered that a 13-year-old female student named Samantha had been using a school-issued iPad to have inappropriate conversations with adult men using a dating application called Meet24.¹ (T. Tr. 13-15.) Sgt. Brent Beaulieu² of the Bangor Police Department and Det. Rick Canarr of the Penobscot County Sheriff's Office, the assigned investigators, took control of the device and began communicating with individuals using Samantha's Meet24 account.³ (T. Tr. 14.)

On March 18, 2014, a man later identified as the Defendant, 32-year-old Russell Carter, began a conversation with "Samantha." (T. Tr. 17-18, 29-30, 102.) As "Samantha," Sgt. Beaulieu expressed to the Defendant the user's age as 13 and referenced her homework and her parents. (T. Tr. 18.) Between March 18 and April 12, the Defendant and "Samantha" communicated using the Meet 24 application. (T. Tr. 19-20.) Between March 30 and April 20,⁴ the Defendant and "Samantha"

¹ With this dating application, a user can browse the profiles of other users, searching by geographic location or by age, and converse with them. (T. Tr. 16-17, 90-91.)

² Sgt. Beaulieu has been an investigator for the Bangor Police Department since 1998 and has worked in law enforcement since 1990. (T. Tr. 12.) He graduated from the Maine Criminal Justice Academy in 1996 and has completed specialized training for investigating computer crimes. (T. Tr. 13.)

³ Samantha's profile included photographs of herself and listed her age as under 18. (T. Tr. 16-17, 35.)

⁴ Messages between March 30 and April 7 were inadvertently deleted due to a storage feature on the iPad. (T. Tr. 22-23.)

communicated using an application called Kik Messenger.⁵ (T. Tr. 20.) The Defendant sent the messages from Bowdoin, in Sagadahoc County, Maine, and Sgt. Beaulieu received the messages in Penobscot County, Maine. (T. Tr. 20, 40-41.)

On March 28, the Defendant told "Samantha" she is pretty and asked if she is single. (State's Ex. 2.) "Samantha" told the Defendant she is only 13 and her mother won't allow her to date. *Id.* The Defendant responded by telling "Samantha" she is pretty again. *Id.* The Defendant then asked "Samantha" if he could hug her. *Id.* Then, on this first day of conversation, the Defendant asked "Samantha" to "come hang out." *Id.* When "Samantha" responded that she is only 13 and can't drive, the Defendant suggests he come get her. *Id.* The Defendant told "Samantha" he wanted to kiss her, asked her about her bra color and size, talked about groping her, and told her "I bet u will like it." *Id.* He told her he wanted to touch her breasts and genitals and asked her to touch his genitals, and he told her twice that he wanted to "teach" her. *Id.* He discussed meeting up with her, performing oral sex on her, and having penile-vaginal sex with her. *Id.*

Between March 29 and April 20, the Defendant continued requesting that "Samantha" engage in sex acts with him. (T. Tr. 23, 25-26, 31; State's Ex. 2; State's Ex. 3.) On March 29, the Defendant again suggested a meet-up to occur the next Sunday (April 6) and discussed

⁵ Sgt. Beaulieu as "Samantha" suggested the switch from Meet24 to Kik Messenger to ensure preservation of the evidence. (T. Tr. 20-22, 69.)

transportation logistics.⁶ State's Ex. 2. The Defendant told "Samantha" he would bring her a cell phone. *Id.* The Defendant and "Samantha" agreed to meet on April 6 in a parking lot behind Dick's Mini Mart in Carmel. (T. Tr. 25-26.) The Defendant and "Samantha" discussed that the Defendant would pull in and "Samantha" would approach his vehicle. (T. Tr. 25.) The Defendant asked "Samantha" if she was a cop, and expressed concern because a friend of his had recently been arrested out-of-state for engaging in similar conduct. (T. Tr. 25-26, 65.) On the morning of April 6, "Samantha" told the Defendant that if he did not feel comfortable meeting, the two could continue talking; the Defendant insisted he wanted to meet. (T. Tr. 26, 65-66.) The Defendant did not appear at the location in Carmel on April 6 and later indicated to "Samantha" that he had had a family emergency. (T. Tr. 26.)

On April 10, the Defendant again discussed a meet-up with "Samantha" to occur on April 20 at around 11 o'clock. State's Ex. 3. The Defendant told "Samantha" he bought a TracFone for her and planned to pick her up at the Carmel store. *Id.* The Defendant described to "Samantha" the vehicle he would arrive in: a black Ford truck. *Id.* Again, the Defendant did not appear. (T. Tr. 31-32.)

⁶ The Defendant indicated he would pick up the victim in his Blazer, and indicated the time of the meet-up would depend on when he got out of work the previous day. State's Ex. 2.

LAW AND ARGUMENT

I. The affirmative defense of renunciation does not apply to the crime of solicitation of a minor to commit a prohibited act.

In certain circumstances, a defendant may claim the affirmative defense of renunciation. "In a prosecution for solicitation under Section 153 ... it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited." 17-A M.R.S.A. § 154(2)(B). Under Section 153, "[a] person is guilty of criminal solicitation if the person, with the intent to cause the commission of the crime, and under circumstances that the person believes make it probable that the crime will take place, commands or attempts to induce another person, whether principal or accomplice," to commit murder, or to commit a Class A or B crime. 17-A M.R.S.A. § 153(1).

Renunciation does not apply here because the State did not allege solicitation under Section 153. Although the crime is entitled "solicitation," this is a different crime altogether. A person is guilty of solicitation of a minor to commit a prohibited act when the State proves the person, "with the intent to engage in a prohibited act with the other person, knowingly solicits directly or indirectly that person by any means to engage in a prohibited act and the actor: (1) is at least 16 years of age; (2) knows or believes that the other person is less than 14 years of age; and (3) is at least three years older than the age expressed by the other person." 17-A M.R.S.A. § 259-A(1)(A). The crime is complete at the

moment the defendant solicits the minor to engage in a prohibited act while having the intent to engage in the prohibited act.⁷

Under Section 153, the State alleges that a person commands another person to commit a crime. In this case, the Defendant was not commanding "Samantha" to commit a crime; had a 13-year-old girl done the acts the Defendant commanded, the 13-year-old girl would not have committed a crime, and the 13-year-old girl would not have been a legal accomplice to the crime. The 13-year-old girl would have been a victim of a sex crime at the hands of the Defendant.

II. Viewed in the light most favorable to the State, the evidence was sufficient to prove beyond a reasonable doubt that, at the time of the solicitation, the Defendant intended to engage in a prohibited act with "Samantha."

The trial court found as a fact that the Defendant, at the time he solicited "Samantha" to commit prohibited acts with him, intended to engage in those prohibited acts. (V. Tr. 3.)

"When a defendant challenges the sufficiency of the evidence on appeal, [the Law Court] review[s] the evidence in the light most favorable to the State to determine whether a fact-finder could rationally find

⁷ A review of the legislative history of Section 259-A confirms the law aims to protect children by prohibiting the "sexual solicitation of a child" for the "preservation of the public peace, health, and safety." L.D. 1673, Emergency Preamble (125th Legis. 2011). In contrast, the comment with respect to the renunciation defense indicates: "The major purpose of this section is to provide a limited defense to persons whose conduct, while criminal, has not yet brought about substantive harm, provided that they take steps to prevent that harm." 17-A M.R.S.A. § 154 cmt. (1975). The harm referenced in Section 259-A is not an eventual sexual abuse of a child; rather, it is the mere request in those circumstances.

beyond a reasonable doubt every element of the offense charged.” *State v. Hayden*, 2014 ME 31, ¶ 12, 86 A.3d 1221 (internal citations omitted).

With respect to intent, in this case, the State presented evidence that the Defendant, over the course of three weeks, repeatedly and aggressively and with explicit detail requested that “Samantha,” whom he understood was a 13-year-old girl based on regular reminders and indicators in her profile, engage in a variety of sex acts with him. The Defendant made specific plans -- including times and locations and vehicles -- to follow through with his requests. This kind of planning is mundane in nature, and it stands to reason that the Defendant would discuss sex with “Samantha” to arouse himself but that he would engage in mundane planning in order to consummate his fantasies.

Furthermore, when “Samantha” suggested that if meeting made the Defendant uncomfortable, the two could continue talking, the Defendant insisted on meeting. Viewing these circumstances in the light most favorable to the State, a fact-finder could rationally find beyond a reasonable doubt that the Defendant, at the time he solicited “Samantha,” intended to engage in prohibited acts with her.

III. The trial court did not err in denying the Defendant’s motion to dismiss based on improper venue after the close of the State’s case when the illegal communications were sent from Sagadahoc County, Maine, and received in Penobscot County, Maine.

First, the Defendant waived a challenge to venue. The Maine Rules of Unified Criminal Procedure require that a trial take place in the county

in which the crime occurred. M.R.U. Crim. P. 21(a). The rule provides that a defendant may move to change the venue “if the court is satisfied that there exists in the county where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial in that county.” M.R.U. Crim. P. 21(b)(1). The rule further provides that “[t]he motion may be made only before the jury is impaneled or, where trial is by the court, before any evidence is received.” *Id.* In this case, the Defendant did not challenge venue until the close of the State’s case. Therefore, the Defendant effectively waived a challenge to venue under the criminal procedure rule.

Second, the State proved jurisdiction. Maine law provides “a person can be convicted of a crime only when the State proves beyond a reasonable doubt that either the conduct [that] is an element of the crime or the result [that] is such an element occurs within this State.” *State v. Collin*, 1997 ME 6, ¶ 6, 687 A.2d 962, 964; 17-A M.R.S.A. § 7. In this case, the State proved that the Defendant communicated from Sagadahoc County to a location in Penobscot County. Because the “result” of the communication occurred in Penobscot County, venue was proper, and because the conduct occurred in two locations within Maine, the Superior Court had jurisdiction. *See State v. Newell*, 638 A.2d 1159, 1160 (Me. 1994) (“The Superior Court has statewide jurisdiction.”).

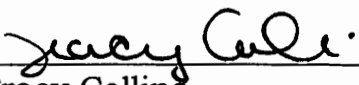
Finally, even if venue were improper, “provisions as to venue have no substantial bearing upon a defendant’s constitutional rights except as

they have bearing upon the defendant's right to trial by a jury of the vicinity." *State v. Baldwin*, 305 A.2d 555, 559 (Me. 1973). This case was tried before a judge, not a jury, and the Defendant makes no suggestion that holding the trial in Penobscot County deprived him of a fair trial.

CONCLUSION

WHEREFORE, for the reasons stated above, the State respectfully requests that this Court affirm the judgment of conviction in this case.

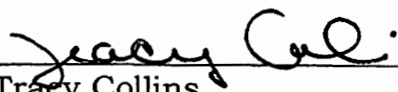
Dated: May 6, 2016


Tracy Collins
Assistant District Attorney
Maine Bar No. 4835

District V Attorney's Office
97 Hammond St.
Bangor, ME 04401
(207) 942-8552

CERTIFICATE OF SERVICE

I certify that I have this 6th day of May, 2016, caused two copies of the State's brief to be mailed by U.S. mail, postage prepaid, to Hunter J. Tzovarras, counsel for the appellant, at P.O. Box 391, Hampden, ME 04444.


Tracy Collins
Assistant District Attorney
Maine Bar No. 4835

